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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

LUIS ENRIQUE DOMINGUEZ,

Defendant and Appellant.

G036984

(Super. Ct. No. 03CF3772)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Robert R. Fitzgerald, Judge. (Retired judge of the Orange Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Andrew H. Do for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Pamela Ratner-Sobeck and James H. Flaherty III, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

INTRODUCTION

Defendant Luis Enrique Dominguez challenges his conviction for second degree robbery. He first contends the prosecutor committed prejudicial misconduct during closing argument. Defendant has forfeited this argument because he did not

object to the prosecutor's argument or request an admonition from the trial court. Even if we were to reach the merits, we would conclude (1) the closing argument did not constitute misconduct, and (2) even if there was misconduct, there was no prejudice to defendant.

Defendant next argues substantial evidence did not support the jury's verdict. We also reject this argument. The victim of the robbery clearly identified defendant after the robbery, in a photographic lineup, and at trial. A police officer who had had numerous contacts with defendant also identified him from the store's security videotape.

Therefore, we affirm.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Alfredo Labustro was working as a clerk at a Circle K store in Tustin on November 18, 2003. At 2:30 a.m., defendant entered the store. Labustro recognized defendant as a regular customer for the preceding three or four months. Defendant removed a soda from the cooler, and approached the counter. When Labustro rang up the soda on the cash register, defendant pulled out a black gun and demanded money. Labustro handed defendant \$35 or \$40 from the cash register. Defendant was three feet away from Labustro when he pulled out the gun.

Officer James Backus responded to the Circle K within minutes after the robbery and interviewed Labustro. At that time, Labustro described the robbery suspect as a male Hispanic, approximately five feet five inches tall, between 45 and 50 years old, who spoke with a Spanish accent.

A still photograph was produced from the Circle K's security videotape and posted in the Tustin Police Department briefing room. Officer Mark Black saw the photograph, and identified the robbery suspect as defendant. Officer Black had had 10 to

12 previous contacts with defendant; all but one of those contacts occurred at the Circle K in question or while defendant was walking along the street in the area of the Circle K.

Labustro identified defendant from a six-pack photo lineup. After Labustro identified defendant, the detective conducting the photo lineup told Labustro that an officer had also identified defendant from the store security videotape.

Defendant's residence was located on California Street, about three-tenths of a mile from the Circle K. A search warrant was executed, and the police recovered a nine-millimeter semiautomatic black or blue steel handgun from the bedroom of defendant's brother. At trial, Labustro was not able to identify the recovered gun as the one used in the robbery.

At trial, Labustro could not recall how tall defendant was, or how old he was. Labustro, however, positively identified defendant in court as the person who robbed him.

Defendant testified in his own defense that he was not living at the California Street residence at the time of the robbery. Initially, he could not remember the street address of the residence in Anaheim where he was living, but later remembered it was 1645 Palm Street. He continued to report the California Street address to the Orange County Probation Department as his residence, and received no mail at the Palm Street address for a year. Defendant lived in a sober living home from February to May 2003 to deal with a drug problem, and was in county jail from May to September 22, 2003. He admitted frequenting the Circle K daily for about 10 years, but did not remember ever seeing Labustro in the store.

Defendant denied robbing the Circle K, and denied being the person seen on the store's security videotape. Defendant claimed Labustro was wrong when he identified defendant as a regular customer, when he picked him out of the six-pack photo lineup, when he identified him as the robber in the videotape, and when he made an

in-court identification of defendant as the robber. Defendant also testified Officer Black was wrong when he said he had had several contacts with defendant.

Defendant was charged with second degree robbery (Pen. Code, §§ 211, 212.5, subd. (c)); a conduct enhancement of personal use of a firearm was also alleged (*id.*, § 12022.53, subd. (b)). Following a jury trial, defendant was convicted of second degree robbery, and the conduct enhancement allegation was found true. The trial court sentenced defendant to 15 years in state prison – the upper term of 5 years on the robbery conviction and a consecutive 10-year term on the conduct enhancement. Defendant timely appealed.

DISCUSSION

I.

THE PROSECUTOR DID NOT COMMIT PREJUDICIAL MISCONDUCT.

On appeal, defendant argues that the prosecutor committed misconduct during closing argument by (1) arguing defendant committed the robbery to support his drug habit; (2) suggesting the jury look at nine booking photographs of defendant; (3) exaggerating the state of the evidence; and (4) expressing a personal opinion regarding defendant's guilt.

The Attorney General argues defendant has forfeited this argument on appeal because defendant's counsel did not object to the prosecutor's closing argument. The Attorney General is correct. To preserve the right to make a claim of prosecutorial misconduct on appeal, the defendant must make a timely objection at trial and request an admonition to the jury. (*People v. Farnam* (2002) 28 Cal.4th 107, 167.) A defendant is excused from the necessity of timely objecting and requesting an admonition if either would have been futile. (*Ibid.*; *People v. Hill* (1998) 17 Cal.4th 800, 820.)

In this case, posing objections and requesting admonitions would not have been futile. The trial court immediately could have corrected any misleading statements

by the prosecutor. Had defense counsel requested admonitions, we are reasonably sure the trial court would have given at least some of them. Defense counsel's failure to make timely objections and requests for admonishment therefore bars defendant from challenging the prosecutor's comments on appeal.

Even absent forfeiture, defendant's arguments would fail. We consider whether there is a reasonable likelihood the jury construed or applied any of the prosecutor's complained-of remarks in an objectionable fashion. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1001.) We do not lightly infer that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's comments. (*People v. Frye* (1998) 18 Cal.4th 894, 970.)

During his own testimony, defendant admitted he had spent time in jail and in a sober living home in 2003 because he had a drug problem. Defendant also admitted prior arrests for drug possession. In closing argument, the prosecutor made the following statements: "The defendant also told you about his drug problem. This is where I am going to ask you to use your common sense. Someone that has a drug problem, that is in and out of custody, that has to go to some rehabilitation for the drug problem, what does that all lead up to? Maybe someone that doesn't act entirely rationally. Maybe a drug user with that bad of [a] problem gets desperate and needs money for drugs. [¶] That's using your common sense, that's a citizen of this planet, you know that to be true. Drugs are not free. And when that problem gets so bad that you begin to get in trouble for it, and feel free to look at the eight or nine booking photographs, okay, the problem gets so bad that you are going to turn anywhere you can, that all lines up perfectly with the fact that he was within 3/10 of a mile within the location, had access to a gun, went in there regularly, was identified by an officer, and was identified by the clerk." The prosecutor's argument urged the jury to make the reasonable inference that if defendant had a drug problem, he would need money to purchase drugs, giving him the motivation to commit the robbery. This inference was a proper comment on the evidence, and was not

misconduct. (*People v. Panah* (2005) 35 Cal.4th 395, 463; *People v. Vargas* (2001) 91 Cal.App.4th 506, 569.) We reject defendant's argument that the prosecutor was improperly asking the jury to infer defendant was guilty of robbery because he had a drug problem.

A series of nine booking photographs was admitted into evidence. Officer Black identified defendant in each, and testified defendant's appearance was different in each. Defendant suggests that by inviting the jury to review these photos, the prosecutor was inferring defendant was guilty of the robbery because "'once a criminal, always a criminal.'" We disagree. The defense case at trial hinged on establishing Labustro and Officer Black were mistaken in identifying defendant as the robber. Defendant focused heavily on the fact Labustro's description of defendant to the police was not the same as defendant's actual physical appearance and on the poor quality of the videotape which he asserted prevented anyone from identifying him as the robber. Under these circumstances, it was permissible for the prosecutor to argue in rebuttal that defendant's appearance had changed over time. We conclude there was no prejudice and no misconduct.

Defendant claims the prosecutor exaggerated the state of the evidence by telling the jury there was a soda on the store counter, and a gun in defendant's hand, despite the fact these items could not be seen clearly in the security videotape. Labustro, however, testified defendant placed the soda on the counter and pulled out a gun. The prosecutor was not exaggerating the state of the evidence, but rather was connecting the testimony of the eyewitness victim with the images on the videotape, which had been admitted into evidence.

Defendant also argues the prosecutor improperly expressed his personal opinion of the strength of the evidence by arguing that although the quality of the store's security videotape was poor, it was "consistent with [the testimony of] the witness." In support of this argument, defendant cites *People v. Mayfield* (1997) 14 Cal.4th 668,

781-782, in which the Supreme Court determined, “it is misconduct for a prosecutor to express a personal belief in the defendant’s guilt if there is a substantial danger that the jurors will construe the statement as meaning that the belief is based on information or evidence outside the trial record [citation], but expressions of belief in the defendant’s guilt are not improper if the prosecutor makes clear that the belief is based on the evidence before the jury [citation].” Here, the prosecutor was clearly basing his argument on the videotape and Labustro’s testimony. There was no misconduct.

Even if the prosecutor had committed misconduct, the error would have been harmless. First, the jury was instructed: “You must decide what the facts are. It is up to you exclusively to decide what happened, based only on the evidence that has been presented to you in this trial. [¶] . . . [¶] You must decide what the facts are in this case. You must use only the evidence that was presented in this courtroom or during the jury view. [¶] . . . Nothing that the attorneys say is evidence. In their opening statements and closing arguments, the attorneys discuss the case, but their remarks are not evidence.” As a reviewing court, we presume the jury relied on the instructions, not the arguments of counsel, in reaching its verdict. (*People v. Morales* (2001) 25 Cal.4th 34, 47.)

Second, any misconduct by the prosecutor would be harmless in light of the overwhelming nature of the evidence against defendant. Labustro immediately recognized defendant when he entered the store, and later positively identified him from a photo lineup and at trial. A police officer also identified defendant from a still photograph taken from the Circle K’s security videotape. The jury was able to view the security videotape. Defendant’s own testimony that he had never seen or met Labustro was in direct conflict with Labustro’s testimony he was well acquainted with defendant. And defendant’s testimony that he was not, at the time of the robbery, living in the house in which the gun was found was inconsistent with the fact he informed the probation department that was, in fact, his address, and that he had never received any mail at the address at which he claimed to be living.

II.

SUBSTANTIAL EVIDENCE SUPPORTED THE JURY'S VERDICT ON THE ROBBERY COUNT.

Defendant also argues there was insufficient evidence to support the jury's verdict. "In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The federal standard of review is to the same effect: Under principles of federal due process, review for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citation.] The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. [Citation.] "“Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant's guilt beyond a reasonable doubt. “If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.” [Citations.]” [Citation.]” (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

Defendant contends that because Labustro was “unclear” about defendant's age and height, and could not identify the gun in evidence as the gun used during the robbery, there was not substantial evidence to support the jury's verdict. We disagree. Labustro – the eyewitness victim – recognized defendant as a regular customer immediately after the robbery. Labustro positively and unhesitatingly identified

defendant as the man who robbed him in a photo lineup and at trial. Officer Black, who had had numerous contacts with defendant in and around the Circle K store, identified defendant from the store's security videotape. What defendant perceives as weaknesses in the prosecution's case are immaterial to the jury's verdict. There was more than substantial evidence to justify the jury's verdict.

DISPOSITION

The judgment is affirmed.

FYBEL, J.

WE CONCUR:

SILLS, P. J.

RYLAARSDAM, J.